

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)
)
Amendment of the Commission's)
Rules to Establish New Personal)
Communications Services)
)

GEN Docket No. 90-314

To: The Commission

REPLY OF THE
ASSOCIATION OF INDEPENDENT DESIGNATED ENTITIES
TO OPPOSITIONS TO
PETITIONS FOR RECONSIDERATION

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to Section 1.429(g) of the Commission's Rules, hereby replies to Oppositions filed in this proceeding against certain Petitions for Reconsideration of the Second Report and Order.^{1/} AIDE has previously participated in this proceeding, and its qualifications are a matter of public record.

I. TO ENCOURAGE NATIONWIDE PCS AVAILABILITY, THE COMMISSION SHOULD PERMIT PARTITIONING OF PCS MARKETS AND PROVIDE FOR THIRD-PARTY LICENSING OF UNSERVED PCS AREAS.

In its Opposition filed in this proceeding, AIDE (at 2-7) supported those Petitioners who favored voluntary partitioning of PCS markets as a method for accelerating nationwide PCS service. GTE concurred in this analysis.^{2/} However, several other par-

^{1/} Personal Communications Services, 8 FCC Rcd 7700 (1993) (GEN Dkt. No. 90-314) (Second Report and Order).

^{2/} Comments of GTE Service Corporation (at 9-10).

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ties opposed PCS market partitioning, based on a series of illusory grounds.

For example, Nextel argues that partitioning would "inject additional variables into the initial auction process."^{3/} This argument attacks a non-existent proposal. AIDE and the other parties have suggested that the Commission should permit voluntary, post-auction or post-settlement market partitioning. No one is calling for the Commission to auction partitioned markets.

In a related position, MCI absurdly characterizes the proposed reliance on cellular-like unserved-area rules as a "de jure elimination of construction deadlines...."^{4/} Nothing could be further from the truth.

As cited in AIDE's Opposition, various Petitioners have documented that the existing PCS coverage rules will promote "spectrum red-lining" and result in rural areas receiving PCS coverage on a greatly delayed schedule, if at all. Adoption of unserved-area rules will provide a "use it or lose it" incentive for PCS licensees to cover their entire PCS market. Thus, as the Commission's cellular experience shows, having unserved-area rules accelerates universal mobile service.

^{3/} Opposition to Petitions for Reconsideration of Nextel Communications, Inc. ("Nextel") at 13.

^{4/} MCI Opposition at 18 n.38.

Finally, GCI raises the specter that PCS licensees will act against their own ultimate self-interest if partitioning is permitted.^{5/} Specifically, GCI fears that:

[A] licensee could partition a licensed area, keeping the most populated portion ... but dispose of the less populated portions of the area to entities, perhaps to sham or dummy corporations, that are unwilling or unable to provide adequate service....

Id. This argument necessarily assumes that a PCS licensee will bid against others for an entire market, but deliberately elect to perform corporate waste by abandoning a part of its potential service area. Any PCS licensee acting in such obvious bad faith would run significant risks of regulatory sanctions, shareholder derivative suits, and dramatic declines in its stock prices.

It is far more logical to assume that a PCS licensee intending not to develop a portion of its PCS area would sell that portion to another entity, who (having paid a substantial sum of money) then also would have a strong incentive to provide PCS service to its partitioned area. Further, even if GCI's worst-case scenario were to occur, the proposed PCS unserved-area rules would result in the unserved-area being recovered by the Commission and re-licensed to a willing entity.

The Commission's cellular experience is that the twin policies of voluntary marketing partitioning and re-licensing of unserved areas has worked well to provide marketplace incentives for nationwide cellular service. The public interest would be

^{5/} Comments and Opposition of General Communication, Inc. on the Petitions for Reconsideration ("GCI") at 15-16.

ill-served if the Commission were to walk away from that experience in adopting its final PCS rules.

II. RAND-McNALLY'S DEFENSE OF ITS ALLEGEDLY PROPRIETARY MTA AND BTA MARKET DEFINITIONS REQUIRES THE COMMISSION TO ADOPT PUBLIC-DOMAIN DEFINITIONS FOR PCS MARKETS IN ORDER TO SERVE THE PUBLIC INTEREST.

In its Opposition filed in this proceeding, AIDE (at 9-15) supported those Petitioners who favored the Commission's adoption of non-proprietary definitions for the PCS markets. Several other parties concurred in this analysis, generally supporting Telocator's proposal for an independent Commission listing of the PCS market definitions.^{6/}

Quite naturally, only Rand McNally opposed this proposal.^{7/} As noted in AIDE's Opposition (at 12-13), RMN previously had offered to make its MTA and BTA definitions available under impossibly hobbling terms.^{8/} The RMN Letter proposed that the Commission could reproduce RMN's MTA and BTA definitions for the

^{6/} Opposition and Comments of Pacific Bell and Nevada Bell to Petitions for Reconsideration at 6-8; Comments on Petitions for Reconsideration of Utilities Telecommunications Council at 19-21; Comments of Telocator, The Personal Communications Industry Association ("Telocator") at 9-10.

^{7/} Comments of Rand McNally on Petitions for Reconsideration and Clarification ("Rand McNally" or "RMN").

^{8/} See Letter dated December 8, 1993, from Deborah Lipoff, RMN's Assistant General Counsel, to the Commission's Office of the General Counsel ("RMN Letter"). The RMN Letter is filed in the docket of this proceeding.

AIDE uses the phrase "RMN's MTA and BTA definitions" in this Reply only to differentiate between RMN's definitions and the Commission's definitions, and not to concede that it regards RMN's definitions as validly copyrighted.

"internal use" of its recipients, but not for the interchange of ideas between various participants in the PCS industry. For that interchange of ideas, RMN effectively saw itself as the tollbooth on the information highway.

In its Comments, RMN retreated from the RMN Letter by withdrawing its offer that the Commission reproduce RMN's MTA and BTA definitions in the rules or by Public Notice. RMN now makes the following proposal:

- Withdrawing its prior offer, RMN now will not allow the Commission to reproduce RMN's MTA and BTA definitions. Instead, the Commission can only make the definitions available "for public inspection (but not for reproduction...."^{9/}
- For internal use to "end users," RMN will make available "through license of a diskette version of the [PCS market definition] listing ... at a one-time reasonable cost" and will make available "through license of a print listing ... at a one-time reasonable cost which will be significantly lower than the cost of the diskette listing...."^{10/}
- RMN will require "resellers and repackagers of the MTA/BTA county listings" to obtain "an express license" from RMN, under "alternative flexible reseller/repackager licensing packages with terms and conditions that depend upon the extent (in scope and time) of the proposed use."^{11/}
- If these conditions are not acceptable to the Commission, then RMN wants the Commission to "select an alternative

^{9/} RMN Comments at 6. This proposal is absurd. What good is it to inspect the RMN MTA and BTA definitions at the Commission if you can't record the definitions for later use? Or is RMN saying that a photocopy of its definitions is subject to its copyright but an independent transcription thereof isn't? Alternatively, does RMN merely want everyone who inspects the RMN MTA and BTA definitions at the Commission immediately to forget what they've seen?

^{10/} RMN Comments at 7-10.

^{11/} Id. at 10.

means of defining the geographic boundaries for the PCS."^{12/}

RMN's Comments raise far more concerns than they resolve.

First, the Commission may consider the potential lack of enforceability of PCS market definitions which it cannot reproduce. It smacks of the movie Animal House's "double secret probation" to envision a Commission enforcement letter stating that a PCS licensee has encroached upon a county (which the Commission cannot identify) of an adjacent PCS market. At some point, RMN's desire for copyright protection will result in the violation of due process rights of PCS applicants and licensees.

Second, RMN is asking the Commission to accept a pig in a poke.^{13/} What does RMN propose for the "one-time reasonable cost" of the diskette listing of the PCS market definitions, or for the "one-time reasonable cost [for the printed definitions]

^{12/} Id. at 11. In the playground vernacular, RMN would then "take its ball and go home."

^{13/} AIDE's Opposition (at 13-14) raised six scenarios under which RMN (in its expansive view of copyright) could possibly seek a royalty payment. Although AIDE filed its Opposition early and served its Opposition on RMN, RMN has yet to confirm the accuracy (or inaccuracy) of those scenarios. Nor has RMN yet responded to AIDE's suggestion (Opposition at 10 n.18) that RMN must commit to make its MTA and BTA definitions available on a non-discriminatory basis at a cost-based license fee as a prerequisite to the Commission's retention thereof for PCS.

Of course, AIDE's Opposition and RMN's Comments could have crossed in the mail, and so the Commission should not draw any inference at this time from RMN's silence. However, if RMN's Reply Comments (if filed) fail to address these issues, then the Commission could reasonably infer that RMN's conduct will not be consistent with the rapid development of the PCS industry and thus is not in the public interest.

which will be significantly lower than the cost of the diskette listing"? What does RMN propose for the "alternative flexible reseller/repackager licensing packages" for the PCS market definitions? Until RMN's proposed terms, conditions, and costs are disclosed and made subject to public comment,^{14/} the Commission and potential PCS entrants cannot make an informed decision of the effects upon the PCS industry of accepting RMN's offered license.

Third, as AIDE's Opposition discusses in detail (at 12-13), RMN's position is inconsistent with the fundamental concept that the free flow of information between members of the communications industry is an essential prerequisite to the development of PCS. The "internal use" of PCS definitions by a substantial portion of the communications industry is to advise others of the definitions and their significance in a variety of regulatory and business contexts.

For all these reasons, the Commission should reject RMN's proposed PCS-definition license terms and instead (as outlined in AIDE's Opposition at 14-15) adopt any of several non-proprietary definitions for the PCS markets.

^{14/} To AIDE's knowledge, RMN has never publicly disclosed its proposed MTA- and BTA-definition license terms.

III. THE RECORD IS SILENT ON U.S.WEST'S PROPOSAL THAT THE COMMISSION SHOULD ADOPT SOME UNSPECIFIED RULES FOR PROCESSING PCS APPLICATIONS; A SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING FOR THIS PURPOSE IS REQUIRED.

In its Opposition filed in this proceeding, AIDE (at 15-18) argued that U.S. West's attempt to have certain, largely unspecified rules for processing PCS applications adopted on reconsideration in this proceeding was both impermissibly vague and filed in the wrong proceeding. AIDE instead requested that the Commission issue a supplemental Notice of Proposed Rulemaking proposing specific processing rules.

No other party to this proceeding commented upon U.S. West's proposal, thus leaving the Commission with a silent record on the issue of PCS application-processing rules. This silence confirms AIDE's position that a supplemental Notice of Proposed Rulemaking is required.

IV. THE OPPOSITIONS CONFIRM THAT THE COMMISSION SHOULD EXPAND ITS LIMITATIONS ON CELLULAR CROSS-OWNERSHIP OF PCS SYSTEMS TO INCLUDE OWNERSHIP OF OTHER SYSTEMS WHICH COMPETE WITH CELLULAR, SUCH AS ESMR.

In its Opposition filed in this proceeding, AIDE (at 18-21) with minor exceptions supported the Commission's rules which limit intra-market cellular eligibility for PCS. AIDE also suggested that the Commission should extend its cross-ownership restrictions to other PCS (and cellular) competitors, such as ESMR. Several other parties substantially concurred in this analysis.^{15/}

^{15/} MCI at 7-18; GCI at 3-13; Partial Opposition of Cablevision Systems Corporation to Petitions for Reconsideration (continued...)

Quite naturally, with the exception of CIS, the existing cellular carriers oppose the cellular cross-ownership prohibitions. For the reasons set forth in its Opposition (at 18-20 & n.33) AIDE supports the Oppositions of rural telcos (who are classified as designated entities) and otherwise urges the Commission to reject the positions of those who seek to weaken the cellular cross-ownership rules.

CONCLUSION

Accordingly, the Association of Independent Designated Entities respectfully requests that the Commission adopt its substantive PCS rules with the changes as set forth herein and in

^{15/} (...continued)
("Cablevision") at 2-4, 7-13; Opposition of PCS Action, Inc. to Petitions for Reconsideration at 13-17; Opposition to Petitions for Reconsideration of Cellular Information Systems, Inc. ("CIS") at 2-8 (PCS Second Report and Order "is an admirable decision that balances many competing interests in a reasonable manner"). See also Opposition to Petitions for Reconsideration of American Personal Communications at 3-9 (cellular industry seeks to hobble rapid development of PCS); Comments of Telephone and Data Systems, Inc. at 11 (cellular cross-ownership rules should be expanded to ESMR).

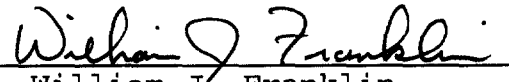
For the reasons set forth in its Opposition (at 7-9), AIDE opposes Cablevision's suggestion (Opposition at 5-7) that the Commission should not tailor its cross-ownership prohibitions to honor the statutory preferences for designated entities.

AIDE's Opposition. The Commission must also issue a Further Notice of Proposed Rulemaking to propose rules for processing PCS applications.

Respectfully Submitted,

**ASSOCIATION OF INDEPENDENT
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CERTIFICATE OF SERVICE

I, Andrea Kyle, a secretary in the law firm of William J. Franklin, Chartered, hereby certify that a copy of the foregoing Reply of the Association of Independent Designated Entities to Oppositions to Petitions for Reconsideration was mailed, first-class postage prepaid, this 13th day of January, 1994, to each of the parties listed on the attached Service List.

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